IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1406 OF 2004

Shri M.U. Joshi, A-301, New Guru Kripa Apartment, Opp. Minu Minar, Near CBI Colony, Veera Desai Road, Andheri (West), Mumbai - 400 058 ..Petitioner.

V/s.

1) The Tax Recovery Officer, Range (1), 2nd Floor, Earnest House, Nariman Point, Mumbai - 400 021.

2) The Assistant Commissioner of Income-tax, Circle-8(1), Mumbai

3) Union of India ..Respondents.

Mr.V.H.Patil, Advocate with Ms.Asifa Khan for petitioner.

Mr.Ashok Kotangale, Advocate with G.Hariharan for respondents.

CORAM : V.C.DAGA & J.P.DEVADHAR, JJ.

DATED : 20TH SEPTEMBER, 2005.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Where an immovable property attached for

recovery of any tax, interest, penalty or any other sum under the Income Tax Act, 1961 is sold beyond the period of limitation prescribed Rule 68B of the Second Schedule to the Income Tax Act, 1961, whether such sale is a valid sale is the question raised in this petition.

2. The petitioner at the relevant time was a partner of M/s. Joychem Chemical & Pharmaceuticals Industries (‘the firm’ for short). Pursuant to the assessment orders passed under section 143 (3) of the Income Tax Act (‘I.T. Act’ for short) for A.Y.86-87 and 87-88, huge demands were raised against the said firm. Appeals filed by the firm against the said assessment orders were dismissed by C.I.T.(A) and further appeals filed by the firm were also dismissed by the I.T.A.T. by a common order dated 15/6/1994. There is no dispute that the order passed by the I.T.A.T. on 15/6/1994 has attained finality.

3. As the firm failed to discharge the tax liability finalised for the assessment years A.Y.86-87 and 87-88, the tax recovery officer treated the petitioner who was a partner of the firm as defaulter and attached the residential flat of the petitioner bearing Flat No.301-1, New Guru Kripa Apartment,

village Amboli, Veera Desai Road, Andheri (W), Mumbai for recovery of the demand confirmed against the firm.

4. It appears that by a proclamation of sale dated 26/8/1996 the tax recovery officer sought to sell the said flat by a public auction on 26/9/1996, but the same did not materialise.

5. In the meanwhile, the petitioner had filed a Misc. Application dated 19th September, 1996 before the I.T.A.T. seeking stay of the auction sale of his flat to be held as per the proclamation of sale dated 26/8/1996. The said application was dismissed by the I.T.A.T. on 19th May, 1998. In the copy of order, the date of dismissing the aforesaid Misc. Application was erroneously shown as 19/5/1995. This error was rectified by the Tribunal on 17/1/2003.

6. It appears that on several occasions, the Revenue attempted to auction the attached flat but the same did not materialise. Ultimately, by a proclamation of sale dated 23rd February, 2004, the tax recovery officer fixed the auction of the attached flat on 30th March, 2004 for recovery of Rs.5,11,73,470/- including costs and interest. The petitioner objected to the said auction on the ground that the limitation prescribed under Rule 68B of the Second Schedule to the

I.T. Act for sale of the attached immovable property has already expired and, therefore, the property of the petitioner cannot be auctioned and that the attachment levied is liable to be lifted forthwith. Rejecting the objection of the petitioner, the tax recovery officer on 30/3/2004 confirmed the sale of the attached flat for Rs.10,00,000/- in favour of the Government of India under Rule 63(1) of the Second Schedule to the I.T. Act. Challenging the aforesaid confirmation of sale, the present petition is filed.

7. Mr.Patil, learned counsel for the petitioner submitted that under Rule 68B of the Second Schedule to the I.T. Act, sale of any immovable property attached for recovery of tax dues cannot be effected after the expiry of three years from the end of the financial year in which the order giving rise to the demand of any tax, interest, fine or penalty, for the recovery of which the immovable property has been attached. It is submitted that even if the above period of three years is to be treated as four years as per public notice dated 01/03/1996 and the extended period of one year available in case resale as provided under the proviso to rule 68B(1) is also taken into account, the sale is required to be completed within 5 years from the end of the financial year in which the demand of tax,

interest, fine or penalty has attained finality. In the present case, the demand for A.Y.86-87 and 87-88 attained finality on 15/6/1994 as per the order of I.T.A.T. and, therefore, the period of five years would expire on 31st March, 2000 [i.e. from 1/4/1995 to 31st March, 2000]. Since the immovable property is sold on 30/3/2004 i.e. beyond the period of five years from the end of the financial year in which the demand attained finality, the said sale confirmed on 30/3/2004 is liable to be quashed and set aside.

8. In reply, it is submitted by Mr.Kotantale, learned counsel for the Revenue that the petition suffers from gross delay and laches inasmuch as, on conclusion of the auction sale on 30th March, 2004, the right, title and interest in respect of the said flat has vested in the purchaser. It is submitted that the petitioner had alternate remedy of challenging the proclamation of sale and filing a writ is not the proper remedy. It is further submitted that although the demand had attained finality on 15/6/1994, the Misc. Application filed by the petitioner was dismissed on 19/5/1998 and, therefore, the limitation would commence from the end of the financial year in which the Misc. Application was dismised i.e. from 1/4/1999 and the period of 5 years would end on

31/3/2004. Since the sale is completed on 30/3/2004, the said sale is within the period of limitation and hence valid.

9. We have carefully considered the rival submissions. Rule 68 B of the Second Schedule to the I.T.Act reads as under :-

"**Time limit for sale of attached immovable property.**

68B (1) No sale of immovable property shall be made under this Part after the expiry of three years from the end of the financial year in which the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has become conclusive under the provisions of section 245-I or, as the case may be, final in terms of the provisions of Chapter XX.

Provided that where the immovable property is required to be re-sold due to the amount of highest bid being less than the reserve price or under the circumstances mentioned in rule 57 or rule 58 or where the sale is set aside under rule 61, the aforesaid period of limitation for the sale of the immovable property shall stand extended by one year.

(2) In computing the period of limitation under sub-rule (1), the period -

(i) during which the levy of the aforesaid tax, interest, fine, penalty or any other sum is stayed by an order or injunction of any court; or

(ii) during the proceedings of attachment or sale

of the immovable property are stayed by an order or injunction of any court; or

(iii) commencing from the date of the presentation of any appeal against the order passed by the Tax Recovery Officer under this Schedule and ending on the day the appeal is decided.

shall be excluded :

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation for the sale of the immovable property is less than 180 days, such remaining period shall be extended to 180 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

(3) Where any immovable property has been attached under this Part before the 1st day of June, 1992, and the order giving rise to a demand of any tax, interest, fine, penalty or any other sum, for the recovery of which the immovable property has been attached, has also become conclusive or final before the said date, that date shall be deemed to be the date on which the said order has become conclusive or, as the case may be, final.

(4) Where the sale of immovable property is not made in accordance with the provisions of sub-rule (1), the attachment order in relation to the said property shall be deemed to have been vacated on the expiry of the time of limitation specified under this rule. "

Rule 68B of the Second Schedule to the I.T. Act, thus, makes it obligatory on the part of the revenue to complete sale of the immovable property attached by it for recovery of any tax, interest, fine / penalty or any other sum within the period prescribed therein. In

other words, the sale of the immovable property attached for recovery of any tax, interest, etc. cannot be held after the expiry of the period of limitation prescribed under Rule 68B and the if the sale is not completed within the prescribed period therein, the attachment if any levied on the property is liable to be vacated.

10. Rule 68B was introduced in the Second Schedule to the I.T. Act by Finance Act, 1992 specifically with a view to prescribe time limit of three years for sale of attached immovable properties. Proviso to Rule 68B (1) provides for extension of one more year in certain cases where the sale falls through. In other words, if the sale held within the period of three years could not be completed for some reason set out therein, then, under the proviso to rule 68B(1) extention of one more year is available for effecting the sale. Rule 68B(2) provides for exclusion of the period during which the demand is stayed by any Court.

11. The period of limitation under Rule 68B(1) for sale of the attached property commences from the date on which the demand of any tax interest, fine, penalty or any other sum for the recovery of which the immovable property has been attached has become

conclusive under the provisions of section 245 I or under the provisions of Chapter XX of the I.T.Act.

12. In the present case, the I.T.A.T. by its order dated 15/6/1994 confirmed the demand raised against the firm. It is not in dispute that the firm has not initiated any further proceedings and thus the demands raised against the firm have attained finality on 15/6/1994. Therefore, 15/6/1994 would be the starting point for computing the limitation prescribed under Rule 68B.

13. The contention of the revenue is that the petitioner had filed a Misc. Application against the proclamation of sale and the said Misc. Application was dismissed on 19/5/1998 and, therefore, the limitation under rule 68B would commence from 1/4/1999 and if 1/4/1999 is taken as the starting point for computing the limitation, then the period of limitation of 5 years would expire on 31/3/2004 and, therefore, the confirmation of sale dated 30/3/2004 would be within the period of limitation.

14. The question, therefore, to be considered is whether, the period during which the Misc. Application filed by the petitioner was pending before the I.T.A.T.

is liable to be excluded while computing the period of limitation prescribed under rule 68B ?

15. Admittedly, the Misc. Application filed by the petitioner was not to seek stay of the levy of tax, interest / penalty confirmed by the order of the I.T.A.T. dated 15/6/1994. The said Misc. Application was filed by the petitioner seeking stay of the auction of his flat to be held as per the proclamation of sale inter alia on the ground that the attached flat was the only flat owned by the petitioner and if the petitioner is evicted from the said flat, then, the petitioner and his family members will be rendered homeless. Admittedly, during the pendency of the Misc. Application, neither the recovery of tax, interest / penalty which has attained finality on 15/6/1994 has been stayed nor the auction sale under the proclamation of sale was stayed. In the absence of any order staying the recovery, mere filing of Misc. Application would not fall in any of the categories specified in rule 68B (2) of the Second Schedule to the I.T. Act and, therefore, the period during which the Misc. Application was pending cannot be excluded while computing the period of limitation under Rule 68B of the I.T. Act.

16. In this view of the matter, in the facts of the case, we are of the opinion that the limitation for sale of the attached immovable property commenced from 15/6/1994 and not from 19/5/1998 as erroneously contended by the revenue. Once it is held that the limitation under Rule 68B commences from 15/6/1994, then, the sale held on 30/3/2004 being beyond the period of limitation prescribed under 68B becomes invalid. The contention of the revenue that the petition suffers from delay is without any merit because, even before the sale was completed the petitioner had raised the point of limitation, but the same was rejected and the sale was confirmed. The writ petition was filed immediately thereafter on 31/5/2004 and, therefore, it cannot be said that the petition suffers from delay.

17. Accordingly, the petition succeeds. The sale of the immovable property held on 30/3/2004 beyond the period of limitation prescribed under rule 68B of the Second Schedule of the I.T. Act is quashed and set aside. We are not expressing any opinion as to whether the said immovable property can be attached again and sold for recovery of the dues, because, that is not an issue raise in this petition. However, we make it clear that setting aside the sale dated 30/3/2004 shall

not affect the right of the revenue to recover its dues by adopting such procedure as is permissible in law.

13. Petition is allowed in the above terms and rule is made absolute in terms of prayer clause (a) and (b) with no order as to costs.

(V.C. DAGA,J.)

(J.P. DEVADHAR, J.)